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No. 04-394

Supreme Court, U.S.
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In The
Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. RESPONDENT'S EIGHTH AMENDMENT CHALLENGE TO THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE WAS NEITHER "FAIRLY PRESENTED" TO NOR "ADJUDICATED ON THE MERITS" BY THE TENNESSEE STATE COURTS.

The federal habeas statute and this Court's jurisprudence place an affirmative obligation on state prisoners seeking habeas corpus relief to "exhaust[] the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1). To provide the State with the necessary "opportunity to pass upon and correct" alleged constitutional violations, the prisoner must "fairly present" his claim in each appropriate state court, thereby alerting the court to the federal nature of the claim. *Baldwin v. Reese*, 124 S.Ct. 1347, 1349 (2004) (citing *Duncan v. Henry*, 513 U.S. 364 (1995) (*per curiam*)). Unquestionably, Cone did not "fairly present" his challenge to the HAC aggravator to the Tennessee Supreme Court on direct appeal as contemplated by this Court in *Baldwin*. Indeed, far from failing to alert the state court to the "federal nature" of his claim, Cone did not present the claim under any legal theory. Although Cone points to excerpts from criminal court orders entered in his second post-conviction proceeding as "evidence" that, despite his failure to challenge the HAC aggravator, the state supreme court adjudicated the issue anyway, he cannot overcome the following indisputable facts which are fatal to his argument. First, Cone failed to raise his Eighth Amendment claim on direct appeal, and the Tennessee Supreme Court did not address the issue in its opinion. Second, the *only* state appellate court to which the issue has ever been presented determined that it was precluded from addressing the merits of the claim on the

basis of a state procedural bar.[1] (App. 97-104) Because Cone's claim has not been properly *presented* to any state court nor *addressed* in any state-court opinion, there is no state-court "adjudication" to review under §2254(d)(1).[2] Even the Sixth Circuit majority acknowledges the absence of any clear support from the Tennessee courts that Eighth Amendment vagueness challenges such as Cone's are "implicitly reviewed" as part of the state supreme court's mandatory review of death sentences on direct appeal. (App. 13)

The Sixth Circuit's decision in this case disturbs a twenty-year-old death sentence and casts uncertainty on the finality of virtually every other capital case in Tennessee based upon nothing more than a legal fiction, namely, that the state supreme court implicitly decided a claim never brought to its attention by Cone. Certiorari is warranted under Supreme Court Rule 10(c).

II. RESPONDENT'S PRESENTATION OF CLAIMS NOT FAIRLY INCLUDED WITHIN THE QUESTIONS ON WHICH PETITIONER SEEKS CERTIORARI VIOLATES SUPREME COURT RULE 14.1(a) AND THIS COURT'S PRECEDENT.

Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." It has long been

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[1] As the Tennessee Court of Criminal Appeals observed, "Grounds for relief which have been previously determined or waived are *not cognizable* in a post-conviction action. T.C.A. §40-30-111 (1990)." (Emphasis added) (App. 99)

[2] In construing a federal statute, courts must assume that the ordinary meaning of the language employed accurately expresses the legislative purpose. *Perrin v. United States*, 444 U.S. 37, 42 (1979). "Adjudication" is commonly defined as "[t]he formal giving or pronouncing a judgment or decree in a court proceeding." *Black's Law Dictionary* 42 (6th ed. 1990).

established, however, that a respondent need not cross-petition in order to "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it." *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). Indeed, this Court has noted that the "prevailing party . . . may assert in a reviewing court any ground in support of a judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970). *See also United States v. Shirey*, 359 U.S. 255, 261 & n.5 (1959) (appellate courts "review judgments, not arguments"). But the license to assert additional contentions, arguments or theories in support of a lower court's judgment does not permit a respondent to expand the questions presented with additional claims not "fairly included" within the questions presented by the petitioner or passed upon by the lower court. Respondent's argument in this case does both. Of the six questions presented in respondent's brief in opposition to the petition for writ of certiorari, only the first two are fairly included within the questions set forth in the petition for writ of certiorari and, thus, properly before this Court. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280-81 (1993) (Supreme Court Rule 14.1(a) sufficient in itself to exclude consideration of constitutional claim not fairly included within questions on which petitioner sought certiorari).

In its initial opinion in Cone's federal habeas corpus appeal, the Sixth Circuit affirmed his first-degree murder convictions, but reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating the death sentences due to ineffective assistance of counsel at sentencing. *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). Although Warden Bell petitioned this Court for a writ of certiorari as to the Sixth Circuit's decision with regard to the death sentence, Cone did not file a cross-petition attacking the distinct portion of the judgment concerning his convictions for murder. Among the claims

decided by the Sixth Circuit with respect to Cone's judgments of conviction were the questions now presented by respondent in Questions 3, 4 and 6 of his Brief in Opposition, specifically: (1) Cone's contention that the state courts' finding that his claims were "previously determined or waived under Tenn. Code Ann. §40-30-112 (1990)" did not constitute an independent and adequate state procedural bar supporting the federal district court's procedural default determination (respondent's Question 3);[3] (2) Cone's *Brady* claim with respect to evidence of drug use at or around the time of the offense (respondent's Question 4); and (3) Cone's claim of prosecutorial misconduct during closing argument at the guilt phase of his trial (respondent's Question 6).[4] *Cone*, 243 F.3d at 967-68, 969, 970-74. Because respondent failed to apply for certiorari on these claims when he had the opportunity to do so and the questions are not "fairly included" within the questions presented by petitioner in the pending petition, Supreme Court Rule 15.1(a) precludes consideration of respondent's claims.[5]

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[3] The Sixth Circuit rejected Cone's contentions regarding the adequacy of the state procedural bar specifically with respect to defaulted guilt-phase issues. However, his position regarding sentencing issues was not materially different, and, indeed, much of the same argument rejected by the Sixth Circuit as to guilt-phase issues was "incorporated by reference" into Cone's argument concerning sentencing issues.

[4] Although Cone now casts his *Brady* and prosecutorial misconduct claims as "sentencing issues," the claims were directed toward the jury's deliberations at the guilt phase, not sentencing, and the Sixth Circuit specifically ruled against Cone on the merits of those claims in its disposition of his federal habeas challenge to the first-degree murder convictions. *Cone*, 243 F.3d at 969-71, 973.

[5] Respondent's reliance upon this Court's decision in *Major League Baseball Players' Ass'n v. Garvey*, 532 U.S. 504 (2001), as authority for this Court's consideration of issues addressed by the Sixth Circuit in its initial opinion, is misplaced. While this Court undoubtedly has authority to consider all substantial federal questions determined in earlier stages of the litigation, such issues must first be raised properly by

(Continued on following page)

In *Federal Trade Comm'n v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927), this Court declined, in the absence of a cross-petition for certiorari, to consider an issue raised by the respondent concerning a portion of the lower court's judgment distinct from that at issue in the certiorari petition:

> A party who has not sought review by appeal or writ of error will not be heard in an appellate court to question the correctness of the decree of the lower court. This is so well settled that citation is not necessary. The respondents are not entitled as of right to have that part of the decree reviewed. . . . And, assuming power, we are not moved by any persuasive consideration to examine the parts of the Commission's order to which the respondents object.

Id., at 66. *See also Charles Warner Co. v. Independent Pier Co.*, 278 U.S. 85, 91 (1928) ("Objections to the decree below were offered by counsel for respondents in their briefs and arguments here. But no application for certiorari was made in their behalf and we confine our consideration to errors assigned by the petitioner"); *Hubbard v. Tod*, 171 U.S. 474, 494 (1898) ("And, as respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner").

Respondent's remaining claim challenging the Tennessee Supreme Court's analysis of the "great risk of death" aggravating circumstance (respondent's Question 5) was presented and fully argued before the Sixth Circuit in the proceedings on remand from this Court's decision in *Bell v. Cone*, 535 U.S. 685 (2002) ("*Cone I*"). However, the Sixth Circuit did not pass upon it in rendering its decision, nor is the issue "fairly included" within the questions presented by petitioner. Therefore, that issue is also excluded from

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petition (or cross-petition) for writ of certiorari pursuant to Supreme Court Rules 12 and 13.

consideration herein. *See* Supreme Court Rule 15.1(a) ("Only questions set out in the petition, or fairly included therein, will be considered by the Court").

But even if this Court were to consider respondent's Question 5 as an alternative basis for upholding the Sixth Circuit's judgment, it would provide him no benefit. Cone contends that the Tennessee Supreme Court's determination on direct appeal, that the jury's application of the "great risk of death to two or more persons" aggravating circumstance was harmless beyond a reasonable doubt, was both contrary to and an unreasonable application of this Court's precedent under 28 U.S.C. §2254(d)(1). (Resp. Brief, pp. 30-32) He specifically faults the state court for considering an aggravating circumstance never found by the jury (felony murder) and failing to give appropriate consideration to mitigating evidence.

In the guilt phase of the trial, Cone did not dispute committing the murders for which he was charged but claimed he was not guilty by reason of insanity or lacked the requisite mental capacity at the time of the offenses. The jury rejected Cone's insanity defense, convicting him at the conclusion of the guilt phase of two counts of first degree murder, three counts of assault with intent to commit first degree murder, and robbery by use of a deadly weapon. *Cone I*, at 690.

During opening statements at sentencing, the prosecutor stated that the State would prove four aggravating circumstances to support imposition of the death penalty: (1) that Cone was previously convicted of one or more felonies, other than the present charge, involving the use or threat of violence to the person; (2) that Cone knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder; (3) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (4) that the murder was committed for the purpose of avoiding arrest or prosecution of the defendant or another. Tenn. Code Ann. §§39-2-203(i)(2), (3), (5) and (6). *Id.* The

jury returned verdicts of death for each of the two murders, finding that the State had proven all four aggravating circumstances beyond a reasonable doubt and that there were no mitigating circumstances sufficiently substantial to outweigh those aggravating circumstances. *Cone I*, at 691.

On Cone's appeal, the Tennessee Supreme Court found that, although the evidence clearly showed that more than two persons were in danger during the course of Cone's attempted escape from his crime spree, the aggravating circumstance under Tenn. Code Ann. §39-2-203(i)(3) ("great risk of death to two or more persons") was not intended to apply to an extended criminal episode, but instead "contemplates multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based." *State v. Cone*, 665 S.W.2d 87, 95 (Tenn. 1984). (App. 83-84) The Court thus found that the evidence failed to support the jury's verdict as to that aggravating circumstance. *Id.* Nevertheless, the court concluded that the jury's erroneous finding "was harmless beyond a reasonable doubt and does not warrant the granting of a new sentencing hearing." *Id.* (App. 84)

The threshold question under §2254(d) is whether the state court correctly identified the governing legal rule. In *Chapman v. California,* 386 U.S. 18 (1967), this Court held that constitutional errors at trial do not necessarily require reversal, but before a federal constitutional error can be held harmless, "the court must be able to declare a belief that it was *harmless beyond a reasonable doubt*." *Chapman*, 386 U.S. at 24 (emphasis added). In Cone's case, the Tennessee Supreme Court identified the correct legal standard for the harmless-error analysis, holding that "any error [] committed by the jury . . . was harmless beyond a reasonable doubt in view of multiple aggravating circumstances which were clearly established." (App. 81) The state court's harmless-error analysis in Cone's case, therefore, was not "contrary to . . . clearly established Federal law"

under 28 U.S.C. §2254(d)(1),[6] and a federal court's analysis on habeas review is confined to the question whether the state court unreasonably applied clearly established federal law when it determined that the jury's application of the "great risk of death" aggravating circumstance constituted harmless error.

Viewed under the appropriate standard, the state court cannot be said to have "unreasonably applied" this Court's established precedent. Although the state court found insufficient evidence as to one of the four aggravating circumstances, it held that the "three other aggravating circumstances were clearly shown by the evidence." *Cone*, 665 S.W.2d at 94. (App. 82) The court observed that the jury had found that Cone was previously convicted of three separate robberies in Oklahoma, thus supporting application of the (i)(2) ("prior violent felony") aggravating circumstance, and that the (i)(6) ("avoid arrest or prosecution") aggravating circumstance was established not only by the testimony of police officers, but also by Cone's own statements to his expert witnesses. *Cone*, 665 S.W.2d at 94-95. (App. 82-83) The state court also recited Cone's "unspeakably brutal conduct" toward his elderly victims in that both were beaten to death by multiple crushing blows to the skull, the fact that their deaths were not instantaneous, and the "terror, fright and horror" they must have endured. *Cone*, 665 S.W.2d at 95.[7]

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[6] Although the Tennessee Supreme Court did not specifically cite *Chapman*, it is clear from the language of its opinion that the court applied the "harmless beyond a reasonable doubt" standard to the jury's erroneous application of the (i)(3) aggravating circumstance. That is all that clearly established federal law required. *See Chapman*, 386 U.S. at 24 ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.")

[7] This Court likewise noted the "extensive evidence demonstrating the cruelty of the killings." *Cone I*, at 699.

Moreover, a reading of the opinion of the Tennessee Supreme Court does not support Cone's contention that the state court failed to consider mitigating evidence. To the contrary, the court's opinion reflects that it was very much aware of Cone's proffered mitigation – indeed, the court recited Cone's mitigation evidence in an earlier section of its opinion (App. 75-76) – but found that it had been severely undercut by other evidence at trial. *Cone*, 665 S.W.2d at 90-92. (App. 76)

Nor does the state court's reference to the felony murder aggravating circumstance render its analysis constitutionally infirm. Although noting that the jury had previously found Cone guilty of both premeditated and felony murder during the guilt phase of trial, the latter being a statutory aggravating circumstance under Tenn. Code Ann. §39-2-203(i)(7), the state supreme court acknowledged that the jury did not "repeat this particular circumstance" at sentencing, although it was supported by the evidence.[8] The court then went on to address the evidence supporting the three remaining aggravating circumstances upon which the jury based Cone's sentence. *Cone*, 665 S.W.2d at 94-95. (App. 82-83) It is clear from a review of the decision as a whole that the court based its finding of harmlessness primarily on the strength of those three aggravating circumstances found by the jury.

In short, the evidence of guilt at Cone's trial was overwhelming, and, even absent the "great risk of death" aggravator, the jury found three other aggravating circumstances, that were fully supported by the record. At the conclusion of the sentencing hearing, the prosecutor did not mention the aggravating circumstance in closing argument, focusing instead on Cone's prior violent felony convictions and other circumstances surrounding the

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[8] The jury verdict did not constitute a rejection of the aggravator; the State simply did not present it at sentencing as one of the four statutory aggravators upon which it was seeking the death penalty.

brutal murders. Both the Tennessee Supreme Court and this Court noted the senselessness, brutality and cruelty of Cone's killing of two elderly persons in their home. Finally, the Tennessee Supreme Court specifically found in its direct review that evidence presented on Cone's behalf had been severely undermined by other witnesses, both lay and expert, presented by the State.

Under these facts, Cone can demonstrate neither an "unreasonable application" of *Chapman* by the state supreme court under §2254(d)(1) nor "actual prejudice" under *Brecht v. Abrahamson*, 507 U.S. 617, 637 (1993) (federal courts on habeas review must determine whether constitutional trial error "had a substantial and injurious effect or influence in determining the jury's verdict"). This claim provides no "alternative ground" for upholding the Sixth Circuit's judgment and is insufficient to defeat certiorari in this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petition for Rehearing Brief Unavailable for Filming at this Time